

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ROYAL WHITAKER III, et al.,

Plaintiffs,

vs.

Case No. 03-2551-GTV

**TRANS UNION CORPORATION,
et al.,**

Defendants.

MEMORANDUM AND ORDER

The court has under consideration Defendants' Joint Motion to Strike Portions of the Errata Sheets to Plaintiffs' Depositions (Doc. 138) filed by Defendants Trans Union Corporation and Experian Information Solutions, Inc. Defendants seek an order striking portions of the errata sheets attached to the depositions of Plaintiffs Royal Whitaker III and Susan Whitaker. Plaintiffs, who are proceeding *pro se*, filed this action claiming violations by Defendants of the Fair Credit Billing Act, 15 U.S.C. § 1666 *et seq.* The depositions of Plaintiffs in question were taken on June 17 and 18, 2004. When transcripts had been prepared, Plaintiffs executed errata sheets which Defendants contend substantially changed portions of their deposition testimony. Defendants now seek an order of the court striking those portions of the errata sheets. Plaintiffs have responded by filing a pleading entitled Plaintiffs' Motion to Strike Defendants' Joint Motion to Strike Portions of the Errata Sheets to Plaintiffs' Depositions (Doc. 141). Filing a motion to strike a party's motion is not an appropriate method in which to respond. Nevertheless, the court will

consider the pleading as a response filed pursuant to D. Kan. Rule 7.1(c), but will deny it rather than carry it on the clerk's record as an unresolved motion.

Defendants' motion to strike portions of the errata sheets is denied because the court has determined to take a different approach to the problem associated with Plaintiffs' changes to their deposition testimony. The court will follow the procedure used by Judge Crow of this court which was approved by the Tenth Circuit Court of Appeals in Burns v. Board of County Commissioners of Jackson County, 330 F.3d 1275 (10th Cir. 2003). In that case, the district court disregarded the changes the plaintiff had made in his deposition testimony when the court ruled on the defendants' motion for summary judgment. Id. at 1281. The court of appeals approved that procedure, and held that the same standards apply to changes in deposition testimony through the use of errata sheets, as have been utilized in cases where the changes were sought to be made through a later filed affidavit. Id. at 1282. The court noted that such filings are sometimes referred to as "sham affidavits." Id. (citing Franks v. Nimmo, 796 F.2d 1230 (10th Cir. 1986)). The factors involved are whether the deponent was cross-examined during the deposition, whether the changes are based on newly discovered evidence, or whether the earlier testimony reflects confusion which the deponent attempts to explain. Id.

In the instant case, Plaintiffs are proceeding *pro se*, and the cross examination factor is not applicable. The court has reviewed the questions asked at the depositions of Plaintiffs and the answers given at the depositions, and concludes that the testimony does not reflect confusion. The court also concludes that the changes set forth on the errata sheets are not based on newly discovered evidence.

Errata sheets may be used to correct errors or to clarify or change an answer when a question is not understood, but it may not be used to alter what has been stated under oath. Rios v. Bigler, 847 F. Supp. 1538, 1546 (D. Kan. 1994) (citing Greenway v. Int'l Paper Co., 144 F.R.D. 322 (W.D. La. 1992) (“A deposition is not a take home examination.”)).

In resolving summary judgment motions in this case the court will disregard substantive changes in their deposition testimony made by Plaintiffs on the errata sheets. Consequently, the court finds it unnecessary to strike the errata sheets, and denies the motion to strike them.

Also pending before the court is Plaintiffs’ Motion for Sanctions Against Defendant (Sic) Trans Union and Experian (Doc. 140). Attached to the motion are a number of exhibits. Plaintiffs do not suggest to the court the sanction to be imposed. The court does not discern from the motion or the exhibits any basis for the imposition of sanctions, and the motion for sanctions is denied.

Plaintiffs have also filed Plaintiffs’ Motion to Strike Defendant Experian Information Solutions, Inc. Request to File Deposition Videos as Exhibits Under Seal (Doc. 145). This motion to strike is another response to a motion, and as stated above should have been filed as a response pursuant to D. Kan. Rule 7.1(c). The motion to strike is denied.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendants’ Joint Motion to Strike Portions of the Errata Sheets to Plaintiffs’ Depositions (Doc. 138) is denied.

IT IS BY THE COURT FURTHER ORDERED that Plaintiffs’ Motion to Strike Defendants’ Joint Motion to Strike Portions of the Errata Sheets to Plaintiffs’ Depositions (Doc. 141) is denied.

IT IS BY THE COURT FURTHER ORDERED that Plaintiffs' Motion for Sanctions Against Defendant (Sic) Trans Union and Experian (Doc. 140) is denied.

IT IS BY THE COURT FURTHER ORDERED that Plaintiffs' Motion to Strike Defendant Experian Information Solutions, Inc. Request to File Deposition Videos as Exhibits Under Seal (Doc. 145) is denied.

The clerk is directed to transmit copies or notices of this order to *pro se* Plaintiffs and to counsel of record.

BY THE COURT IT IS SO ORDERED.

Dated at Kansas City, Kansas, September 3, 2004.

/s/ G. T. VanBebber
G. Thomas VanBebber
United States Senior District Judge